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Investigation of Negligence Claims

Martin J. Welsh*

ACTUAL INVESTIGATIONS OF NEGLIGENCE CLAIMS do not differ in very many respects, whether you investigate for the plaintiff's or the defendant's side.

The attorney, after getting a complete set of facts from his client, and the details of the accident as his client saw it, then must determine whether or not he has a sound case.

Let us take, for example, the investigation of an automobile accident.

A plaintiff's attorney should get his client to sign requests for the police report of the accident, the doctor's report, and also the hospital reports. This facilitates securing these reports. For this purpose the attorney should have printed forms available, so that it is not necessary to type them up.

The police report is a good place to start the investigation. In most cases the police report gives a list of the witnesses, and sometimes there is an urinalysis test result available, which indicates whether or not either of the parties were drinking. It also may contain the comments made by the policemen themselves. Their report shows the physical facts at the first instance. If there was a hit-skip driver, the report may possibly show a license number.

This police information is just as readily available for the defendant's attorney. He also will follow through on any of the witnesses mentioned in the report. Likewise he will also question the police officers who made the investigation.

In many instances where an accident takes place, no witnesses seem to be available at the scene of the accident. In these particular cases both attorneys will then have to "knock on doors" to find someone who might have seen the accident. It will be necessary to talk with any and all persons who live near the scene of the accident. It may even be necessary to check with people who pass this particular spot at the same time approximately every day, and who might have seen the accident, or a part of the accident, take place.

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It is best to know the layout of the scene of the accident before talking to any of the prospective witnesses. In these cases a diagram should be made, with particular emphasis on the distance from the corner, the traffic signs, the absence of traffic signs, the length of skid marks, etc.

Melvin M. Belli, an outstanding plaintiff's attorney, is a great believer in using photos of actual scenes as much as possible. He suggests that a study be made for the best camera angles, and even that color film be used in order to portray the circumstances of the accident as vividly as possible for the jury. Many lawyers use photos in their trial work and others use diagrams showing the positions of plaintiff and defendant, even painting the automobiles their actual color in order to make the pictures as real as possible. But many trial lawyers never fully realize the importance of the contribution that these photos and diagrams make towards helping the jury to see the accident as it happened.

One of the best sources of photos is the newspapers. Go to the public library and leaf through all of the newspapers on or at the approximate date of the accident. You may discover one or more pictures that were taken at the scene.

Whether or not pictures are found, a search should be made of the newspaper morgue, to see if pictures were taken which never appeared in the paper. With this information, it will be easier to question the witnesses. It can be determined whether or not they will be good witnesses for your side. Even though witnesses prove to be "adverse," you must still thoroughly question them, so that you may know in advance what you will have to disprove or overcome in order to discredit their testimony, in the event that the opposing side uses their testimony.

Belli suggests a manner in which it may be possible to get some information from an adverse witness. In the event that he will not answer your oral questions, an interrogation form can be prepared with all of the questions numbered, and spaces left after each question so that the witness can write in the answers to the questions that he intends to answer. By numbering these questions, reference may be made to them without too much explanation. For example, "If the answer to #4 is 'yes,' is the witness willing to produce etc." Naturally each side will probably use only friendly witnesses at trial time.

Each case is pursued with the idea that it will inevitably be brought to trial. No witnesses should be questioned too

lightly. It is important that those persons who were at the scene of the accident, and who didn't even see the accident, by proper interrogation are systematically ruled out. Many of these people at some later date have a way of "recalling" that they did see certain things which now are important to the case at hand.

Many of the witnesses tell some rather fantastic stories. Even these witnesses should be carefully questioned. Their absurd tales can be used to discredit an adverse witness. For example, let's say a hostile witness says that the driver of the car went from a standing stop up to 60 miles an hour in only five seconds, when he hit the injured party. This statement could well help to discredit any other testimony that the witness would give, if this particular statement was so absurd that any reasonable person could not believe it.

Even friendly witnesses may later change, and become adverse. It thus is wise to take their statements as soon as possible.

Most cases are settled out of court, and if good statements are available from witnesses it will help to settle the case, if and when the proper time comes and a fair agreement can be reached.

Make the statements as detailed as possible and take them as soon as possible after the accident, while the witness is still keenly aware of the facts of the accident. All witnesses should be questioned before a notary and under oath. Start out by getting the witnesses' name and address, age, marital status, education, place of employment, whether or not the witness was alone at the time, his location at the scene of the accident, his reason for being there, the date and time of the accident, how far he was from the scene, whether or not he overheard any comments made by either plaintiff or defendant, whether he saw any apparent injury, heard any comments or groans from either plaintiff or defendant that indicated the extent of the injuries, whether any first aid was given, and any other information that could be available at the time. Be certain to determine the credibility of all witnesses.

Take down as exactly as possible the words used by the witness, using words and phrases peculiar to each witness. It is always easier to get a statement signed if the witness recognizes the words in the statement as the words that he used to describe the accident.

After taking a number of statements you will eventually get a feeling of knowing your witness. You will anticipate when a witness may not sign a statement after it is completed. In these instances, misspell a word every so often and have him correct the spelling. Because your statement will be in ink, you won't be able to erase, so you just cross out the word, and in each instance you ask the witness to initial the correction. If he initials these corrections and later refuses to sign the statement, you may use his initials as evidence that he gave the statement at least up to this point.

The best type of witness is one who can remember in detail the important facts as he saw them, and who does not have to be prompted. He will probably be the one who will remember these same facts at trial time.

It is not always easy to get a witness to talk about the accident. They sometimes do not want to get involved. In these instances you must try to play upon the conscience of the witness, his duties as a public citizen, his duty to see that justice is done, and his sense of fair play.

Some of the things that help in a statement are such remarks as his recollection of overhearing the defendant say to the plaintiff, "I'm sorry that I ran into you," or maybe that, "I didn't see any blood, but the plaintiff was holding his head." Other times a witness will say that, "his brakes were no good," and this doesn't really help the case. This is because this is merely his opinion, and it is impossible to tell whether or not the brakes were good without checking them. But if a witness was able to say that "there were no skid marks," then it would appear that the person never used his brakes. Or maybe the witness can state that "the skid marks were 20 feet long," which would show that the driver was traveling fairly fast. Of course, witnesses who are really alert and who notice whether or not the driver signaled or did not signal are always valuable to both sides of the case.

Before going to trial, it is wise to diagram, on a large board, the actual scene of the accident. Then locate each witness in his place, and you can more readily see whether or not the testimony of these witnesses is as plausible as it originally seemed.

It is also a good idea carefully to check the conduct of the injured party since the accident. If he claims to be injured, it may help to have witnesses who have seen him do work around

the house, cutting the grass, painting the house, etc. There are many other things that can be checked also, such as the health record of the injured party, his work record, whether his work is steady, whether he has ever been fired, his attitude towards his job, and his attitude towards his co-workers. Has he ever applied for workmen's compensation because of prior injuries? Whether or not he has ever been involved in any other law suits, particularly those in which he was injured in automobile accidents. And so on.

It is always a good idea to maintain good relations with the police, coroner and other public officials. This will expedite any request for information that you may make of them.

There has been a great deal of comment about taking statements from third party witnesses by using tape recorders. They are especially good when someone other than the attorney takes the statement. Then it can be played back for the attorney, and is doubly authenticated. One advantage of the tape recorder is that it gives you an idea just how this particular witness will sound when he testifies.

There are certain things that you must remember when you use a tape recorder. You should say to the witness, "You understand that this is being recorded by this tape recorder," so that he is aware of it. Also make sure that he acknowledges by saying so. In this manner his acknowledgment will be made part of the recorded statements.

Another good idea is to talk casually to the witness, and to allow him to talk also. Then play back the recording so that he can hear what he has said and how he sounds. This should make him feel more relaxed. Now you can proceed into the detailed questioning.

Another good idea is to take stenographic statements rather than narrative ones. Here the witness is more likely to sign the statement when he realizes that you had nothing to do with the actual drafting of the statement. Then too, if the witness refuses to sign, you can still introduce the statement, once you have qualified it as a statement from the witness.

All of the statements that the plaintiff's attorney gets can also be received by the defendant's attorney, plus all of the information from the police and public officials. The only place where the defendant's attorney usually cannot get the same information is from the plaintiff's doctor. The investigation is practically the same for either attorney, in most respects.

In order better to familiarize yourself with the scientific techniques that are part of this particular phase of the work, you should refer to the several manuals which are published on this subject. See the suggested bibliography, below.

No matter how much practice or experience any investigator has, he still should make use of check lists as suggested in the manuals. The manuals take into consideration a variety of different aspects of negligences, and provide itemized check lists to follow.

Scientific investigation techniques have become more and more important recently. A newly organized group who call themselves the *Society of Professional Investigators* has banded together, aiming to be equivalent to bar associations as a supervisory and professional grouping for investigators, and to promote ethical, scientific work.

One final thought should be emphasized. The case must be prepared so that every possible foreseeable circumstance has been considered, and so that *nothing is left to chance*.

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